Supreme Court, U.S.
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No. 02-724

IN THE SUPREME COURT OF THE UNITED STATES

GRAY DAVIS, ET AL.,
Petitioners,

v.

CHARLES W. THOMPSON, and STEPHEN L. BOGOVICH,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR
THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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GRAY DAVIS, ET AL.,
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v.

CHARLES W. THOMPSON, and STEPHEN L. BOGOVICH,
Respondents.

INTRODUCTION

Petitioners, led by Governor Gray Davis of the State of California, seek a writ of certiorari to resolve circuit conflicts created or exacerbated by the Ninth Circuit's second amended opinion in *Thompson v. Davis*, 282 F.3d 780 (9th Cir. 2002). Petitioners' first question presented asks this Court to resolve the splintered circuit authority addressing whether Congress validly abrogated the state's Eleventh Amendment immunity from suit in enacting Title II of the Americans with Disabilities Act ("ADA"). Petitioners' second question presented asks this Court to resolve conflicting circuit views on whether the ADA governs substantive criminal-justice decision making, such as state officials' decision to parole or arrest, as contrasted with operational aspects of law enforcement such as providing prisoners wheelchairs to attend parole hearings or safely transporting disabled arrestees.

On January 6, 2003, this Court requested a response from Respondents. After one time extension, Respondents filed their opposition on February 20, 2003. Respondents contend that this Court cannot address the first question because of the manner in which the parties addressed the Eleventh

Amendment issue before the Ninth Circuit. Respondents further contend that the second issue was resolved by *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998), and that the division between the circuits is either negated by *Yeskey* or otherwise not sufficiently specific to warrant review. Petitioners now respectfully reply to these contentions and renew their request that this Court grant their petition for a writ of certiorari to resolve these important and divisive issues.

ARGUMENT

I.

PETITIONERS' ELEVENTH AMENDMENT ISSUE WAS PRESENTED BEFORE THE NINTH CIRCUIT AND IS ACCORDINGLY PROPER BEFORE THIS COURT

A. Petitioners and Respondents Both Presented the Eleventh Amendment Immunity Issue to the Ninth Circuit

Respondent contends that Petitioners failed to raise the issue of Eleventh Amendment immunity from suits under Title II of the Americans with Disabilities Act before the Ninth Circuit. Respondent bases this contention primarily on the headings in Petitioners' appellees brief before that court. However, Respondent also recognizes that Petitioner in fact raised the Eleventh Amendment bar to suit before the Ninth Circuit and analogized to *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001). (Opposition, p. 4.) Accordingly, the issue was raised and is appropriately before this Court.

The fact that the Ninth Circuit has declined to conduct a *Garrett* analysis, and that the *Thompson* panel chose to reject Petitioner's contention *sub silentio*, is in no small part the issue presented by Petitioner's petition. *See, e.g., Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, 1171-72 (9th Cir.), *cert. granted*, 123 S.Ct. 561 (2002). As Ninth Circuit dissenters

recognized in their published dissent to the court denying rehearing *en banc* in *Hason*, it is the court's refusal to conduct the analysis that creates "a split with every other circuit to have considered the issue" presented by *Garrett*. *Hason v. Med. Bd. of Cal.*, 294 F.3d 1166, 1168 (9th Cir. 2002) (O'Scannlain, J., dissenting to denial of petition for rehearing *en banc*). The *Thompson* panel simply followed the Ninth Circuit's pre-existing decisions not to conduct a *Garrett* analysis.

Respondent's opposition overlooks subsequent briefing on the *Garrett* issue. Prior to hearing *Thompson*, the Ninth Circuit published *Armstrong v. Davis*, 275 F.3d 849, 878 (9th Cir. 2001), *cert. denied*, 123 S.Ct. 72 (2002). *Armstrong* addressed the *Garrett* issue *sua sponte* and despite the State of California declining to take a position at that time. *Id.* at 878-79 and n.42. *Armstrong* then held the defense waived, yet proceeded to rule that *Garrett* would not bar an ADA Title II action against official capacity defendants. Respondents then raised this argument before the *Thompson* panel pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure. (App. A.) Petitioners responded by briefing the issue in their own Rule 28(j) letter. (App. B.) Accordingly, based either on Petitioners raising *Garrett* in their appellees' brief or on the subsequent Rule 28(j) briefing, the *Thompson* panel received notice of the Eleventh Amendment defense.

Respondents reference no authority for the proposition that this Court cannot grant a *certiorari* petition in order to resolve an issue raised before, but not addressed by, the court below. Respondents instead rely exclusively on *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) for the quoted proposition that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." (Opposition, p. 2.) As addressed *supra*, both Petitioners and Respondents raised the issue before the *Thompson* panel.

Additionally, Respondent offers no opposition to Petitioner's reliance on *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 467 (1945), as an alternative basis to hear this

Eleventh Amendment immunity challenge. (Petition, Statement of Jurisdiction, p. 1-2.) This exception is well-grounded in this Court's precedent. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 683, n.18 (1982) (plurality opinion); *Calderon v. Ashmus*, 523 U.S. 740, 745, n.2 (1998); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99, n.8 (1984); *Edelman v. Jordan*, 415 U.S. 651, 677-78 (1974). Either on this ground, or by recognizing that the parties raised this issue before the *Thompson* panel, Petitioner's *Garrett* challenge is properly before this Court.

B. Petitioners Properly Raised the *Ex Parte Young* Exception as a Necessary Component of Evaluating Eleventh Amendment Immunity From Suit

Respondents next contend that the question of an *Ex Parte Young*, 209 U.S. 123 (1908), exception to Eleventh Amendment immunity may be independently barred from this Court's analysis. Respondents base their opposition on the district court's December 12, 2000, order finding that held official capacity defendants were proper in this action. Respondents overlook the fact that this Court decided *Garrett* on February 21, 2001, two months after the district court's order. (*See* Petition, App. C at 36-37.) Accordingly, Petitioners could not have raised the *Ex Parte Young* argument pursuant to *Garrett*. Instead, this exception to the Eleventh Amendment is an integral component of Petitioner's *Garrett* challenge itself.

Moreover, *Armstrong* resolved the Ninth Circuit view of the *Ex Parte Young* exception in the same manner as it addressed *Garrett*. *Armstrong*, 275 F.3d at 879. The Ninth Circuit recognizes that the appearance of "new law during an appeal ordinarily calls simply for application of the new law." *Montana Wilderness Ass'n v. United States Forest Serv.*, 655 F.2d 951, 955 (9th Cir. 1981). Petitioners accordingly and necessarily petition from the Ninth Circuit's present statement of the law, not the superceded, pre-*Garrett* and pre-*Armstrong* ruling from the district court below.

Respondents' sole legal citation on this issue requires no contrary finding. Respondents reference *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000) for the proposition that Petitioner's decision not to appeal a case won at the district court could deny this Court opportunity to hear the issue. *Nelson*, however, held only that "the lower court be fairly put on notice as to the substance of the issue." As addressed *supra*, Petitioners made the Ninth Circuit aware of the substantive *Garrett* issue in their appellees' brief, and both parties subsequently made the court aware of the *Armstrong* decision's impact on that analysis. In addressing *Garrett* and *Ex Parte Young*, the *Armstrong* decision and the parties' briefing provided the *Thompson* panel notice of this issue. Additionally, Petitioner's Rule 28(j) briefing raised a myriad of opinions addressing this issue. (App. B.) Accordingly, based either upon the parties explicitly addressing this issue or the analytical inseparability of a rule and its exception, Petitioners' *Ex Parte Young* analysis is properly before this Court.

II.

RESPONDENTS' MISUNDERSTANDING OF PETITIONER'S CONTENTIONS DO NOT NEGATE THE EXISTING CIRCUIT SPLIT

A. The Ninth Circuit's Opinion is Not Controlled By *Pennsylvania Dept. of Corrections v. Yeskey*

Respondents initially contend that certiorari is unwarranted because substantive criminal-justice decisions are governed by the ADA pursuant to *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998). *Yeskey* prohibited prison officials from denying prisoners access to a "boot camp" program that, if successfully completed, would have reduceD the prisoner's term of incarceration. *Id.* at 208. However, *Yeskey* did not purport to govern the substantive decision to actually parole the prisoner or to resolve conflicts between the circuits in applying the ADA to substantive decision-making.

Petitioners do not ask this Court to reconsider ADA applicability to the operational aspects of a criminal justice system, such as providing prisoners wheelchairs to attend parole hearings or requiring police officers to transport disabled arrestees safely. Instead Petitioners present the distinct issue of whether the ADA also governs substantive aspects of a state's criminal-justice system such as life prisoner parole suitability determinations or arrests. Accordingly, *Yeskey* did not address this issue and does not control.

B. Petitioners' Referenced Authorities Reflect a Circuit Split Applying the ADA to Substantive Criminal-Justice Matters

Respondents contend that no circuit division exists with regard to applying the ADA to substantive criminal-justice matters. In opposing the petition, Respondents narrowly construe the issue, contending that no other circuit has addressed the issue of applying ADA relief specifically within the context of a state's substantive decision to parole. Petitioners recognize that no other circuit had extended ADA relief in this manner before *Thompson*, just as no other circuit has subsequently adopted the Ninth Circuit's *Thompson* opinion. Respondent's narrow framing of this issue would effectively insulate unique holdings such as *Thompson* from this Court's review. Petitioner's analysis instead appropriately and explicitly addresses the Ninth Circuit's unique extension of the ADA in the more general context of substantive criminal-justice decision making.

Respondents additionally contend that the contrary opinions of *Rosen v. Montgomery County Maryland*, 121 F.3d 154 (4th Cir. 1997) and *Bryant v. Madigan*, 84 F.3d 246 (7th Cir. 1996), should not be considered because they predate *Yeskey*. However, as addressed *supra*, *Yeskey* governed only the operational aspect of a prison program rather than the substantive decision to parole. Additionally, while Respondents contend that these opinions were "implicitly overruled" by *Yeskey*, they cannot identify any opinion of the

deciding courts reversing *Rosen* or *Bryant*. Accordingly, these opinions remains illustrative of circuit precedent contrary to the Ninth Circuit's *Thompson* approach.

Respondents additionally take issue with *Gohier v. Enright*, 186 F.3d 1216 (10th Cir. 1999), and recognize that the *Thompson* panel relied on *Gohier* for the proposition that arrests are not categorically excluded from the scope of the ADA. This overlooks the *Gohier* holding, however, that limited ADA theories to operational issues such as officer training or transport of disabled arrestees. *Gohier*, 186 F.3d at 1222. *Gohier* held that allegations that police chose to shoot a disabled man with a knife, who was wielding the knife because of his disability, stated no ADA claim. *Id.* at 1222. Petitioners accordingly rely on *Gohier* distinguishing between operational aspects of the system and the substantive decisions of state agents, a distinction that the *Thompson* panel declined to recognize.

Petitioners similarly rely upon *Hainze v. Richards*, 207 F.3d 795, 797, 801-02 (5th Cir.), *cert. denied*, 531 U.S. 959 (2000), and its analogous analysis and result. Accordingly, both *Gohier* and *Hainze* conflict with the Ninth Circuit's extension of ADA relief into the decision-making process itself. *Rosen* or *Bryant*, independent of *Yeskey*, provide additional analytical support contrary to the Ninth Circuit's *Thompson* approach. Accordingly, the question of ADA applicability to substantive criminal-justice decision making remains one that divides the circuits, and that calls for resolution by this Court.

CONCLUSION

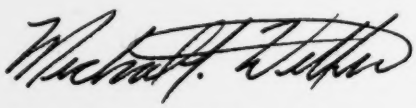
Petitioner's first question presented asks this Court to resolve the splintered circuit court authority governing Eleventh Amendment abrogation under Title II pursuant to the *Garrett* analytical model. This issue is properly before this Court because Petitioners raised it in their appellees brief below, and because both parties briefed the issue pursuant to *Armstrong*. Petitioners' second question presents a significant circuit division regarding ADA applicability to the substantive

criminal-justice decision making of state actors. Both divisions of authority provide grounds for resolution by this Court. Petitioners accordingly and respectfully request that this Court grant their petition for a writ of certiorari to resolve these important and divisive issues.

Dated: March 4, 2003

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
PAUL GIFFORD
Senior Assistant Attorney General



MICHAEL J. WILLIAMS
Deputy Attorney General

Counsel of Record for Petitioners

APPENDIX A

February 25, 2002

Cathy Catterson, Clerk
United States Court of Appeal
for the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

Re: *Thompson v. Davis*
NO. 01-15091

Dear Ms. Catterson:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, I write to bring to the Court's attention the recent case of *Hason v. Medical Board of California*, No. 00-55980, 2002 D.J.D.A.R. 1737 (Feb. 12, 2002). The case, a challenge to the actions of a state agency under Title 11 of the ADA, is relevant to two issues in this appeal.

First, the Court in *Hason* held that "the Eleventh Amendment does not bar [the plaintiff's] Title II claims," in light of the Supreme Court's decision in *Board of Trustees of Univ. of Alabama v. Garrett,* 531 u.s. 356 (2001) (Congress did not validly abrogate the state sovereign immunity in enacting Title I of the ADA). *Hason*, 2002 D.J.D.A.R. 1737 at 1738. Thus, post-*Garrett*, the Court reaffirmed the rule in this Circuit that Congress did validly abrogate state soverien [sic] immunity in enacting Title II of the ADA. This is relevant to appellees' argument that the ADA impinges on states' Elevent Amendment rights and bars appellants' suit. Appellees' Opp. At 8; Appellants' Reply Brf. At 10-11.

Second, the Court in *Hason* held that Title II of the ADA applies to medical licensing, explaining that

> the magistrate judge's narrow construction of the phrase "services, programs, or activities" is at odds with the remedial goals underlying the ADA . . . . Courts must construe the language of the ADA

> broadly in order to effectively implement the ADA's fundamental purpose of 'provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.' . . . . "[T]he ADA's broad language brings within its scope anything a public entity does."

Hason, 2002 D.J.D.A.R. 1737 at 1739 (citations omitted). This affirmation of the Title II's broad reach is relevant to appellees' argument that Title II cannot be read to reach the Board of Prison Terms.

Sincerely,
/s/ [Sara Norman]
Sara Norman
Attorney for Plaintiffs-appellees

cc: Deputy Attorney General Michael Williams (by fax and mail)

APPENDIX B

November 30, 2001

Cathy Catterson, Clerk
United States Court of Appeals
For the Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939
BY FACSIMILE AND MAIL: 415-556-9721

RE: CHARLES W. THOMPSON, ET AL. v. GRAY DAVIS, et al.
Case No. 01-15091

Dear Ms. Catterson:

In response to Appellants' letter of November 28, 2001, bringing to this Court's attention the November 28, 2001 decision in *Armstrong v. Davis*, No. 01-15132 pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, Appellees offer their prompt response in accord with that rule. Appellees respectfully bring to this Court's attention contrary case references for consideration in rebuttal of Plaintiff's newly offered material.

Appellants raise the *Armstrong* decision's reference to *Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001), and the resulting holding that Congress' unconstitutional attempt at abrogating the states' sovereign immunity with regard to Title I of the ADA did not apply equally to Title II of that statute. Slip Opinion at 16105. Appellees previously preserved this issue, in contrast to the *Armstrong* defendants (Slip Opinion at 16104), but previously declined to brief the matter fully because Appellants lacked the opportunity to review *Garrett* prior to filing their opening brief. (Appellees' Brief at 17 n. 3.)

The matter having been newly raised in *Armstrong* and by Appellants, however, Appellees respectfully bring to this

Court's attention and may reference at oral argument the following cases:

Armstrong v. Davis, No. 01-15132 at Slip Opinion 16105: noting *Armstrong* Appellants' waiver of the sovereign immunity issue, specifically with the intent to respectfully request the opportunity to provide the supplemental briefing requested by this Court of the *Armstrong* defendant-appellants;

Board of Trustees of the Univ. of Alabama v. Garrett, 531 U.S. 356, 121 S. Ct. 955, 962-968 (2001): providing analytical model for evaluating the constitutionality of a congressional attempt to abrogate sovereign immunity;

Armstrong v. Wilson, 124 F.3d 1019, 1025 (9th Cir. 1997) (*Armstrong I*), *cert. denied*, 524 U.S. 937 (1998); *Clark v. California*, 123 F.3d 1267, 1270-1271 (9th Cir. 1997), *cert. denied sub nom.*, *Wilson v. Armstrong*, 524 U.S. 937 (1998); *Dare v. California*, 191 F.3d 1167, 1174-1175 (9th Cir. 1999), *cert. denied*, 121 S. Ct. 1187 (2001): addressing abrogation prior to the Supreme Court providing an analytical model for abrogation in *Garrett*; *Demshki v. Monteith*, 255 F.3d 986, 988-989 (9th Cir. 2001): holding abrogation invalid with regard to Title V of the ADA;

Hodgers-Durgen v. de la Vina, 199 F.3d 1037, 1045 (9th Cir. 1999): recognizing that courts exercise extreme caution before authorizing claims for injunctive relief against state criminal processes;

Lavia v. Pennsylvania Department of Corrections, 224 F.3d 190, 193-194 (3d Cir. 2000): addressing *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), where the Supreme Court held that the Age Discrimination in Employment Act was not a valid exercise of Congress' § 5 enforcement power, and recognizing the error of relying on the pre-*Kimel* decision in *Clark*; *Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois Univ.*, 207 F.3d 945, 948, 952 (7th Cir. 2000): reversing pre-*Kimel* finding of constitutional

abrogation with regard to Title I and openly questioning abrogation of Title II;

Neiberger v. Hawkins, 150 F. Supp. 2d 1118, 1121-1124 (D. Colo 2001): recognizing split in Circuit Courts of Appeals with regard to Title II abrogation, concluding abrogation was invalid, and recognizing that pre-*Garrett* contrary decisions did not conform to the Supreme Court's analytical requirements for abrogation;

Patricia N. v. Lemahieu, 141 F. Supp. 2d 1243, 1250 (D. Haw. 2001): finding *Clark* and *Dare* controlling at this time, while recognizing "doubt on the long-term viability" of pre-*Garrett* Title II decisions;

Walker v. Snyder, 213 F.3d 344, 347 (7th Cir. 2000) (citations omitted), *cert. denied,* 121 S.Ct. 1188, and *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1004 (8th Cir.1999) (en banc), *cert. granted*, 120 S. Ct. 1003, *cert. dismissed*, 120 S. Ct. 1265 (2000): addressing inapplicability of the *Ex parte Young* exception for prospective injunctive relief under the ADA, in response to contrary *Garrett* dicta referenced in the *Armstrong* slip opinion concurrence at 16105.

While the unanticipated publication of this Court's *Armstrong* decision and Appellants' raising this issue pursuant to Rule 28(j) make a comprehensive list of supplemental case references impossible, Appellees offer these as a representative sampling of authority relevant to resolving this issue. Appellees will provide any additional case references promptly and pursuant to Rule 28(j) prior to this Court rendering any decision in this matter. Appellees thank this Court for its consideration of this matter

Sincerely,
/s/ [Michael J. Williams]
MICHAEL J. WILLIAMS
Deputy Attorney General

For BILL LOCKYER
Attorney General

cc: Sara Norman, Esq., Prison Law Office (by facsimile and mail)